FILE COPY.

Supreme Court of the United States.

OCTOBER TERM, 1904.

Supreme Court
FILED
FEB 20 1905
JAMES H. McKENNEY,
Clerk

No. 185.

SAMUEL McMILLEN, RONALD MORRISON AND EBEN SMITH, PLAINTIFFS IN ERROR,

vs.

THE FERRUM MINING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

BRIEF FOR DEFENDANT IN ERROR.

CHARLES CAVENDER,
JOHN A. EWING,
Attorneys for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 185.

SAMUEL McMILLEN, RONALD MORRISON AND EBEN SMITH, PLAINTIFFS IN ERROR,

vs.

THE FERRUM MINING COMPANY.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

This is an adverse suit brought by plaintiffs in error against the defendant in error in the District Court of Lake County, Colorado, under Section 2326 United States Revised Statutes, to determine the question of the right of possession to certain mining ground, the plaintiff in error claiming title to said ground as the Eulalia lode mining claim, and the defendants in error claiming title to substantially the same ground as the Golden Rod lode mining claim. The case was tried before the court and a jury, resulting in a verdict and judgment in favor of defendant in error (R., 2-3), which

judgment was affirmed by the Supreme Court of Colorado (R., 224), with denial of petition for rehearing (R., 243).

Plaintiff in error claims title to the Eulalia lode

> "By virtue of a full compliance by themselves and "their grantors with the laws of the United States "and the State of Colorado, and the local laws and "rules of miners in the California Mining District "by pre-emption, discovery, location, purchase, and by "actual prior possession as a lode mining claim located "upon the public domain of the United States, and by "relocation and appropriation of the said premises "as an abandoned and forfeited claim in accordance "with the laws of the United States and of the State "of Colorado;" such claim being set up by plaintiffs in error in their amended complaint. (R., 7).

Defendants in error, in their cross complaint (R., 12), claim title to the Golden Rod lode mining claim by virtue of compliance with the laws of the United States and of the State of Colorado.

On the trial the Court instructed the jury (R., 15-16) in the following language:

> "To make a valid location of a mining claim, a citi- "zen of the United States, or one who has declared his "intention to become such, must enter upon the un- "occupied, unappropriated and unclaimed mineral do- "main of the United States, and discover within the "limits of the claim located, a vein, lode, lead or de- "posit of mineral bearing rock in place, and substan- "tially comply with the following requirements:
>
> "1st. Sink a discovery shaft upon the lode to the "depth of at least ten feet from the lowest part of the "rim of such shaft at the surface, or deeper if neces- "sary, to show a well defined crevice.
>
> "2d. Post at the point of discovery on the surface, "a plain sign or notice, containing the name of the "lode, the name of the locator and the date of dis- "covery.

"3rd. Mark the surface boundaries of the claim by "six substantial posts hewed or marked on the side or "sides which are in toward the claim and sunk in the "ground, to wit, one at each corner and one at the "center of each side line.

"4th. Within three months of the date of discovery, "record the claim in the office of the recorder of the "county in which such lode is situated, by a location "certificate which shall contain, first, the name of "the lode; second, the name of the locator; third, the "date of location; fourth, the number of feet claimed "on each side of the center of the discovery shaft; "fifth, the general course of the lode as near as may "be, and such a description of the lode as shall serve "to identify the claim with reasonable certainty; or "if a discovery shall be made within the boundaries "of the claim at any time after the staking and re- "cording, by the locators or their grantees, such dis- "covery will relate back to the original location, pro- "vided there are no intervening rights acquired by "others."

Plaintiffs in error requested the Court to instruct the jury as follows (R., 20-21):

"To make a valid location of a mining claim, a citi- "zen of the United States, or one who has declared "his intention to become such, must enter upon the "unoccupied, unappropriated, and unclaimed min- "eral domain of the United States, and discover within "the limits of the claim located a vein, lode, ledge or "deposit of mineral bearing rock in place, and sub- "stantially comply with the following requirements:

"First. Sink a discovery shaft upon the lode to "a depth of at least ten feet from the lowest part of "the rim of such shaft at the surface, or deeper if "necessary to show a well defined crevice.

"Second. Post at the point of discovery on the sur- "face a plain sign or notice containing the name of

"the lode and the name of the locator and the date "of discovery.

"Third. Mark the surface boundaries of the claim "by six substantial posts hewed or marked on the side "or sides which are in towards the claim and sunk in "the ground, to wit, one at each corner and one at the "center of each side line.

"Fourth. Within three months of the date of dis- "covery record the claim in the office of the recorder "of the county in which said claim is situated by a "location certificate which shall contain:

"First. The name of the lode.

"Second. The name of the locator.

"Third. The date of the location.

"Fourth. The number of feet claimed on each side "of the discovery shaft.

"Fifth. The general course of the lode as near as "may be, and such a description of the same as shall "serve to identify the claim with reasonable cer- "tainty."

The instruction just quoted from, asked by the plaintiffs in error, was refused by the Court, but if given would have been simply a repetition of the instruction already given.

By the request for the instruction last quoted, made by plaintiffs in error at the trial, and by their failure to except to the instruction given, which declares the steps to be taken and things to be done to make a valid location of a lode mining claim in Colorado, it appears beyond question that plaintiffs in error in the trial court did not in any manner challenge the validity of the statute of Colorado concerning the location of lode mining claims, as appears in Sections 3150 and 3152 of Mills Annotated Statutes of Colorado, which sections read as follows:

"3150. The discoverer of a lode shall, within three "months from the date of discovery, record his claim "in the office of the recorder of the county in which

"such lode is situated, by a location certificate which "shall contain:

"First. The name of the lode.

"Second. The name of the locator.

"Third. The date of location.

"Fourth. The number of feet in length claimed on "each side of the center of discovery shaft.

"Fifth. The general course of the lode as near as "may be."

"3152. Before filing such location certificate the "discoverer shall locate his claim by:

"First. Sinking a discovery shaft upon the lode to "the depth of at least ten feet from the lowest part of "the rim of such shaft at the surface, or deeper, if "necessary, to show a well-defined crevice.

"Second. By posting at the point of discovery on "the surface a plain sign or notice, containing the "name of the lode, the name of the locator, and the "date of discovery.

"Third. By marking the surface boundaries of the "claim."

Plaintiffs in error claim to have located their claim on May 30, A. D. 1893, the location having been made by one John Kennedy. The location certificate was recorded on June 17, 1893 (R., 89-98). From the location certificate it appears that they claimed 150 feet on each side of their discovery shaft in width, and 425 feet running south 77° 30′ east from center of discovery shaft, and 1,075 feet running north 77° 30′ west from center of discovery shaft.

By plaintiffs' exhibit No. 22 (R., 86), the location of the so called discovery shaft can readily be seen as being much nearer the easterly end of the claim than the westerly. By reference to the same exhibit, what was known as the Pocket Liner Shaft, in which they claim there was a discovery of mineral in 1879, appears to be at least 800 feet westerly from their so-called discovery shaft. It appears also from the evi-

dence that the only discovery stake that was ever erected by plaintiffs in error was at the discovery shaft near the easterly end, and at least 800 feet away from the so-called Pocket Liner Shaft, and the only location certificate that was ever filed by them appears in exhibit 23 (R., 89), which claimed the discovery shaft referred to on exhibit 22 as the point where a discovery had been made, although it is admitted by plaintiffs in error that no discovery of mineral was ever made in said so-called discovery shaft, their contention being that John Kennedy, who located the claim in 1893, was the agent of one Samuel McMillen, one of the plaintiffs in error (who is now deceased), and that Samuel McMillen knew that in 1879 or in 1880 mineral had been discovered in the Pocket Liner shaft; and that, therefore, the knowledge of McMillen, and the setting of the stake 800 feet away from the said shaft, and marking the boundaries as provided for by law, constituted a complete and perfect location.

No evidence was offered to show that McMillen knew of the discovery in 1879 or 1880, as the record fails to show that Mr. McMillen was offered as a witness, and it does not appear from the evidence offered that plaintiffs in error ever made any claim by notice on their discovery stake or in their location certificate that they claimed or adopted the former discovery which had been made in the so-called Pocket Liner shaft as the discovery upon which the attempted location of the Eulalia location was based; but, on the contrary, it appears from the evidence that the location of Kennedy was based upon a so-called discovery shaft more than 800 feet distant therefrom, and which showed no mineral and was sunk only in the wash upon the mountain side.

Defendant in error claims by virtue of a discovery made in what has been termed the Pocket Liner shaft on or about the 8th day of March, 1894, as appears by the testimony of

John King (R., 128-30), and which discovery was claimed by the defendant in error in its second amended location certificate, recorded March 8, 1895 (R., 181), although defendant in error had been in possession of the shaft, in which plaintiffs in error claim there was a discovery in 1879 or 1880, from about January 30, 1894.

Plaintiffs in error did not claim or establish on the trial that they had ever made a discovery within the boundaries of their Eulalia which was adopted by them, either by staking or by reference in the record of the claim. They contend that a discovery was made through the Little Vinnie claim some time between September and December, 1894, but offer no evidence that they had ever, by any act, adopted such discovery. Defendant in error's discovery had been made long prior to that time, and defendant in error adopted its discovery in the Pocket Liner shaft by filing its second amended location certificate on March 8, 1895. Plaintiffs in error have never adopted the discovery in the Pocket Liner shaft, either by staking or by recording, nor have they adopted the alleged discovery through the Little Vinnie shaft, either by staking or recording.

Defendant in error contends:

First. That the decision of the Supreme Court of Colorado is not reviewable by this court:

(a) Because there was no ruling in the cause adverse to or in contravention of any express right, title, privilege or immunity of plaintiffs in error under Section 2320 of the Revised Statutes of the United States, or any denial of or against any title, right, privilege or immunity claimed by plaintiffs in error under the statutes or laws of the United States.

(b) Because any claim made by plaintiffs in error that the statute of the State of Colorado, which requires the post-

ing of a notice at the point of discovery, is invalid, inconsistent with, repugnant to, and in contravention of, Section 2320 of the United States Statutes, was not raised at the trial in the State court, nor in the appeal to the Supreme Court of Colorado, and was raised, if at all, for the first time in the petition for a rehearing to the Supreme Court of Colorado.

Second. That no error was committed by the Supreme Court of Colorado.

Twenty-five errors are assigned by plaintiffs in error to the rulings of the Supreme Court of Colorado. The first to the fifth inclusive, the tenth, eleventh, twelfth and thirteenth, being based upon the contention of plaintiffs in error that the ruling of the Supreme Court of the State of Colorado in sustaining the judgment of the District Court of Lake County, Colorado, was in direct contravention of plaintiffs in error's express right, title, privilege and immunity to prove the existence and discovery of a vein and lode at any point or place within the surveyed and claimed limits of the Eulalia lode mining claim, regardless of where the notice containing the name of the lode, the name of the locator, and the date of the discovery was posted on the claim, or whether or not the locator had adopted and claimed the former discovery within the limits of the claim.

By reference to the assignments of error to the rulings of the District Court of Lake County upon the appeal to the Supreme Court of Colorado (R., 216-223), it clearly appears that no such point or question whatever is raised, and it was strenuously contended in the argument on appeal that the acts done and performed by the plaintiffs in error and their grantor, Kennedy, were in full compliance with the statutes of the United States, as well as with the statutes of the State of Colorado, and especially with the requirements of Section 3152 M. A. S.

In support of our contention, the Supreme Court of Colorado says (R., 227-228):

> "It is true that in tendering instructions plaintiffs "submitted one which contained the element of an "adoption by the relocator of a former discovery as "the one upon which his own location was based. "There was no error by the trial court, however, in "refusing to give this instruction, because there was "no evidence, or offer of evidence, by plaintiff that "called for it. The fact that plaintiffs' grantor knew "and claimed that there had been a former discovery "is not equivalent to, nor does it supply the place of, "its selection by him as the one on which his location "is based, particularly in the light of the declaration "in the location certificate that the discovery of the "Eulalia location was made in a discovery shaft in no "way connected with, and some hundred feet distant "from, the place where the former discovery is said to "have been made. It follows from what we have said "that plaintiffs have not brought themselves within "the doctrine they contend for, and are not in a posi-"tion to invoke its application to their case as made.
>
> "2. There is another reason for holding that plain-"tiffs may not avail themselves of that rule. It ap-"pears that they not only do not question the validity "of our State statutes, which prescribe certain acts "as necessary to a valid location, but in their com-"plaint they aver that, in the location of the Eulalia "lode, the provisions of the State, as well as of the "Federal, statutes were complied with; and among the "instructions which they themselves asked the Court "to give was one—applicable both to their own and "the Golden Rod location—in which was the declara-"tion that, as provided by Section 3152 M. A. S., a "valid location of a lode mining claim cannot be made "unless the locator sinks a discovery shaft upon the "lode discovered to a depth of at least ten feet from "the lowest part of the rim of such shaft at the sur-"face, or deeper if necessary, to show a well-defined

"crevice, and unless he posts at the point of discovery "on the surface a location stake containing certain "designated things.

"Such being true, plaintiffs certainly cannot now be "heard to say that they may at their will disregard "these mandatory provisions of State legislation "which they themselves have invoked, for, if we as- "sume their validity (which plaintiffs themselves do "not question, and which they declare they have com- "plied with), the discovery shaft must expose the vein "upon which the location of the Eulalia lode was "based, or at least one vein, and a discovery elsewhere "within the limits of the claim will not supply its "place."

In the petition for rehearing before the Supreme Court of Colorado, which petition appears in the record (229-241), if the question as to the invalidity of the statute of Colorado is raised, it is only raised by inference, and in support of that proposition the Supreme Court of Colorado, in its opinion on petition for rehearing, which petition for rehearing was supported by oral argument (R., 242), says:

"In the oral argument in support of their petition "for rehearing, counsel for appellants confined himself "to three general propositions, and to these will our "discussion be mainly devoted.

"1. That the locators of the Eulalia lode might "have availed themselves of a previous discovery "within the limits of that location, and might have "adopted the same as their own and based their lo- "cation upon it without making a valid discovery for "themselves, there can be no doubt under the authori- "ties cited in the foregoing opinion. Appellants' ar- "gument as to this point may be dismissed with the "single observation, which, in fact, has already been "made, that they did not do so. The record clearly "shows that they have not brought their case within "the principle contended for, since in their offer of

"proof they expressly rely upon mere knowledge of a "former discovery and make no pretense of having "adopted it as their own. It is apparent that appel- "lants, while right in their statement of the law, are "wrong in supposing that the facts of this case call "for the application of any such principle.

"2. Appellants again call to our attention their as- "signments of error directed against the ruling of the "trial court refusing their offer of proof of a discovery "within the limits of the Eulalia, made through the "underground workings of the Little Vinnie claim. In "the original opinion no special reference was made "to this position because the radical defects in ap- "pellants' proof as shown by their offer and by the "record, did not seem to us to call for an application "of the rules of law invoked. Further investigation, "particularly in the light of the oral arguments on "this rehearing, clearly demonstrates the fallacy of "this claim. As we have already determined, ap- "pellants' location of the Eulalia has no standing at "all, if based upon a former discovery made in 1879, "or upon the one alleged to be made in May, 1893, at "the time they went upon the ground and made their "location, and which is admitted to be in the wash "which covers the side of the mountain. At the trial, "though no such claim is made in the complaint, there "was an attempt to show a valid discovery made from "the adjoining Little Vinnie lode. When the trial "court ruled that a valid discovery could not be made "from an opening on another claim or Government "land, it was error; but in view of the facts on which "appellants themselves admit their present contention "is founded, such ruling was not prejudicial for the "reasons which we now state. If it be granted that "such a discovery was made, appellants wholly failed "to follow it up by doing the other essential things "which we said in Brewster v. Shoemaker, 28 Colo., "176, should be done in order to perfect an under- "ground discovery.

"This underground discovery is said to have been "made between the months of September and Decem- "ber, 1894. If so, we fail to see how it can avail the "appellants, for earlier in the year of 1894 the ap- "pellee, as the jury must have found, and as the evi- "dence abundantly shows, made a valid discovery in "the old Pocket Liner shaft within the present bound- "aries of the Golden Rod location. This discovery, "as well as the location based upon it, is prior to that "of appellants, whether or not the law requires in "such circumstances an amended, or additional, loca- "tion certificate to be filed. If the law does not re- "quire such filing, appellee's location of the Golden "Rod is superior to the Eulalia, for the former is first "in point of time; but if such location certificate must "be filed, still appellee must prevail, for appellants "have never filed such certificates at all, and appellee, "in March, 1895, filed its amended location certificate, "in which it bases its location upon the discovery "made in the Pocket Liner shaft. It therefore conclu- "sively follows, according to the facts as appellants "themselves on the oral argument admit them to be, "that there was no prejudicial error on the part of the "trial court in rejecting appellants' offer of proof of a "subsequent underground discovery since, if it was "made, it was not until after appellee had made a "valid discovery, and perfected its location, of the "Golden Rod."

The third proposition is one concerning the duty of the Court to send the jury to inspect the premises, which is based on a State statute, and which the Court interprets, and which construction we assume the plaintiffs in error do not contend that this Court will review.

It becomes evident from the record that no Federal question was raised by plaintiff in error, either in the trial court or in the Supreme Court of Colorado before the petition for a rehearing, and we contend that the question as to the

validity of the State statute was not raised in the State court at all.

> "A suit in a State court to try the right of posses-
> "sion to a mining claim, and the right to a patent
> "therefor, although it is brought in accordance with
> "Section 2326 of the Revised Statutes of the United
> "States, does not necessarily involve a Federal ques-
> "tion, so as to give a right of appeal to the United
> "States Supreme Court."
>
> *Bushnell vs. Crooke Mining & Smelting Co.*, 148 U. S., 682.
> *Telluride Power Transmission Co. vs. Rio Grande Western Railway Co.*, 175 U. S., 639.
> *Blackburn vs. Portland Gold Mining Co.*, 175 U. S., 571.
> *Shoshone Mining Co. vs. Rutter*, 177 U. S., 505.

The decision of the Supreme Court of Colorado in no way brought in question the validity or construction of any Federal statute. The question decided by the Supreme Court of Colorado was whether or not under the statutes of the United States, and of the State of Colorado, the plaintiffs in error had made a valid location prior to the location of the defendant in error or its grantors.

The plaintiffs in error for the first time in making their assignments of error in this court to the judgment of the Supreme Court of Colorado, challenge the validity of the State statute as found in Section 3152 M. A. S., in which the State statute requires that there be posted at the point of discovery a plain sign or notice containing the name of the lode, the name of the locator, the date of location, and the date of discovery; and contend that such provision of the State statute is inconsistent with and in contravention to Section 2320 of the Revised Statutes of the United States.

At the trial in the State court and upon appeal, plaintiffs in error always contended that they had complied with that

provision of the State statute, and in their pleadings and in the instructions asked of the Court they themselves invoke its aid, and do not, either at the trial or upon appeal, question the validity thereof or the authority of the Legislature of the State of Colorado to make and the courts to enforce.

In the case of *Roby vs. Colehour*, 146 U. S., 153, the Court uses the following language:

> "Our jurisdiction being invoked upon the ground "that a right or immunity specially set up and "claimed under the constitution or authority of the "United States has been denied by the judgment "sought to be reviewed, it must appear from the record "of the case, either that the right so set up and "claimed was expressly denied, or that such was the "necessary effect in law of the judgment."

No right or immunity was specially set up or claimed in the case at bar, and no such right was expressly or in effect denied by the judgment.

FEDERAL QUESTION RAISED TOO LATE.

Plaintiffs in error, as appears from the record, did not raise the question as to the invalidity of the State statute in the State court, if at all, until they filed their petition for a rehearing in the Supreme Court.

"It is well settled by the decisions of this court that the attempt to raise for the first time a Federal question in a petition for rehearing, after judgment, comes too late."

Loeber vs. Schroeder, 149 U. S., 580.
Texas & Pac. Ry. Co. vs. Southern Pac. Co., 137 U. S., 48.
Butler vs. Gage, 138 U. S., 52.
Winona & St. P. R. Co. vs. Plainview, 143 U. S., 371.
Leeper vs. Texas, 139 U. S., 462.
Bushnell vs. Crooke, M. & S. Co., 148 U. S., 682.

Which rule is again affirmed by this court in the case of *Sayward vs. Denny*, 158 U. S., 180, in which Mr. Chief Justice Fuller, in speaking for the Court, says:

> "As the validity of no treaty or statute of, or authority exercised under, the United States, nor of "a statute of, or authority exercised under any "State, was drawn in question, it is essential to the "maintenance of our jurisdiction that it should appear that some title, right, privilege, or immunity "under the constitution or laws of the United States "was specially set up or claimed in the State court, "and that the decision of the highest court of the "State, in which such decision could be had, was "against the title, right, privilege, or immunity so "set up or claimed. And in that regard, certain propositions must be regarded as settled: (1) That the "certificate of the presiding Judge of the State court, "as to the existence of grounds upon which our interposition might be successfully invoked, while always regarded with respect, cannot confer jurisdiction upon this court to re-examine the judgment below. *Powell vs. Brunswick Co.*, 150 U. S., 433, 439 "and cases cited. (2) That the title, right, privilege, or "immunity must be specially set up or claimed at the "proper time and in the proper way. *Miller v. Texas*, "153 U. S., 535; *Morrison v. Watson*, 154 U. S., 111, "115, and cases cited. (3) That such claim cannot "be recognized as properly made when made for the "first time in a petition for rehearing after judgment. "*Loeber v. Schroeder*, 149 U. S., 580, 585, and cases "cited. (4) That the petition for the writ of error "forms no part of the record upon which action is "taken here. *Butler v. Gage*, 138 U. S., 52, and cases "cited. (5) Nor do the arguments of counsel, "though the opinions of the State courts are now made "such by rule. *Gibson v. Chouteau*, 8 Wall., 314; *Par*"*malee v. Lawrence*, 11 Wall., 36; *Gross v. Mortgage* "*Co.*, 108 U. S., 477, 484; *U. S. v. Taylor*, 147 U. S., "695, 700. (6) The right on which the party relies

"must have been called to the attention of the Court, "in some proper way, and the decision of the Court "must have been against the right claimed. *Hoyt v. "Thompson*, 1 Black, 518; *Maxwell v. Newbold*, 18 "How., 515. (7) Or, at all events, it must appear from "the record, by clear and necessary intendment, that "the federal question was directly involved, so that the "State court could not have given judgment without "deciding it; that is, a definite issue as to the posses- "sion of the right must be distinctly deducible from "the record before the State court can be held to have "disposed of such federal question by its decision. "*Powell v. Brunswick Co.*, 150 U. S., 433, 439."

Which rule has been since approved by this Court in *Pim vs. St. Louis*, 165 U. S., 273; *Miller vs. Cornwall R. Co.*, 168 U. S., 131; *Meyer vs. Richmond*, 172 U. S., 82; *Citizens' Savings Bank vs. Owensboro*, 173 U. S., 636; *Harding vs. Illinois*, No. 61, October Term, 1904, of this Court.

II.

IF THIS COURT HAS JURISDICTION, WAS THERE ANY ERROR COMMITTED BY THE SUPREME COURT OF COLORADO?

Is the statute of the State of Colorado relating to the location of mining claims, and which requires the sinking of a discovery shaft upon the lode to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper if necessary, to show a well-defined crevice, and the posting at the point of discovery on the surface of a plain sign or notice containing the name of the lode, the name of the locator, and the date of discovery, inconsistent with Section 2320 of the Revised Statutes of the United States?

Section 2320 provides, among other things, as follows:

"A mining claim located after the 10th day of May, "eighteen hundred and seventy-two, whether located

"by one or more persons, may equal, but shall not ex
"ceed, fifteen hundred feet in length along the vein
"or lode, but no location of a mining claim shall be
"made until the discovery of a vein or lode within the
"limits of the claim located. No claim shall extend
"more than three hundred feet on each side of the
"middle of the vein at the surface, nor shall any claim
"be limited by any mining regulation to less than
"twenty-five feet on each side of the middle of the vein
"at the surface, except where adverse rights existed
"on the 10th day of May, 1872, rendering such limita-
"tion necessary. The end lines of each claim shall be
"parallel to each other."

This section has been supplemented by the Legislature of Colorado, as appears by Section 3152, Mills Annotated Statutes of Colorado, passed in 1874, in which it is required, before a valid location can be made, that a shaft shall be sunk by the discoverer upon the lode to a depth of ten feet, or more when necessary, and by posting at the point of discovery on the surface a notice, etc.

The State statute requires the sinking of the discovery shaft on the lode, not at some other point within the boundaries of the claim; it also requires the posting of the notice at the point of discovery, and not at some other point upon the claim.

It was evidently intended by the State statute to make the place where the notice of location is posted the initial point on the lode, and from which the boundaries of the claim can be determined, and it is also intended that to make a valid location of a mining claim, the locator must first discover a lode or deposit of mineral in place, and then erect thereon or in such close proximity thereto as to indicate the point selected as the place of discovery, a plain sign or notice of location containing the notice prescribed by the State statute. This question has been fully considered under

a similar State statute by the Supreme Court of Utah in the case of *Copper Globe Mining Company vs. Allman*, 23 Utah, 410, and also by the United States Circuit Court of Appeals of the Ninth Circuit, in the case of *Nevada Sierra Oil Company vs. Home Oil Company*, 98 Fed., 674, in which Judge Ross uses the following language:

> "It is also true as a matter of law that it is not "necessary that a locator should be the first discoverer "of mineral upon the land in order to make a valid "location; but he must not only have knowledge of the "former discoveries, but such actual discovery must be "adopted and claimed by him in order to give validity "to his location."

The evident purpose and intent of the State of Colorado, and the other States which have passed statutes prescribing additional regulations in respect to the location of mining claims, including the sinking of a discovery shaft on the vein, and posting a notice at the point of discovery, was to require the discoverer of a lode who undertakes to locate the same to designate the point and place at which his discovery is made, and to require him to show a well-defined crevice at that point.

This requirement of the State statute is not inconsistent with or in contravention of the United States Statute, and is simply supplementary to Section 2320. The right of the State to pass acts supplementing the mining act of Congress in respect to the location of mining claims, is recognized by Section 2324 of the Revised Statutes of the United States and the validity of such State legislation has been recognized in the cases of

Belk vs. Meagher, 104 U. S., 279;
Erhardt vs. Boaro, 113 U. S., 527;
Kendall vs. San Juan Silver Mining Co., 144 U. S., 658;

and by the State courts in

Wolfley vs. Lebanon Mining Co., 4 Colo., 112;
O'Donnell vs. Glenn, 8 Mont., 248;
Metcalf vs. Prescott, 10 Mont., 283;
Purdum vs. Laddin, 23 Mont., 387;
Sissons vs. Sommers, 24 Nev., 379;
Copper Globe Mining Co. vs. Allman, 23 Utah, 410;
Northmore vs. Simmons, 38 C. C. A. 211, 97 Fed., 386;

and by this court in the opinion of Mr. Justice Brewer in the case of *Butte City Water Co. vs. Ben Baker*, No. 109, October Term, 1904, in which the following language is used:

> "The Montana statute (Montana Codes Annotated, "Sec. 3612), among other supplementary regulations, "provided that the declaratory statement filed in the "office of the clerk of the county in which the lode or "claim is situated must contain 'the dimensions and "'location of the discovery shaft, or its equivalent, "'sunk upon the lode or placer claims,' and 'the loca-"'tion and description of each corner, with the mark-"'ings thereon.' A failure to comply with these regu-"lations was the ground upon which the Supreme "Court of Montana held the location invalid. It is "contended that these provisions are too stringent, "and conflict with the liberal purpose manifested by "Congress in its legislation respecting mining claims. "We do not think that they are open to this objection. "They certainly do not conflict with the letter of any "Congressional statute; on the contrary, are rather "suggested by Sec. 2324. It may well be that the "State Legislature, in its desire to guard against false "testimony in respect to a location, deemed it import-"ant that full particulars in respect to the discovery "shaft and the corner posts should be at the very be-"ginning placed on record. Even if there were no "danger of false testimony, it was not unreasonable "to guard against the resurrection of incomplete loca-"tions when by subsequent explorations mining "claims of great value have been uncovered."

The foregoing, from the opinion of this Court, seems to be particularly applicable to the case at bar. The section of the Montana code requiring the dimensions and location of the discovery shaft to be contained in the location certificates, is surely as inconsistent with and as much in contravention of the United States statute as the requirements of the Colorado statute, that a notice be posted at the place of discovery and that a disclosure of the vein be made in the discovery shaft at the point where such notice is posted.

Plaintiffs in error wholly failed to make a discovery in the shaft at which their notice was posted, and wholly failed, even if it be assumed that McMillen had knowledge of a vein in the Pocket Liner shaft, to adopt or claim such discovery as the discovery upon which the location of the Eulalia claim was based until long after the intervening rights of defendant in error had been fully perfected.

We submit that if the decision of the Supreme Court of Colorado is reviewable, its judgment was right, and should be affirmed.

Respectfully submitted,

CHARLES CAVENDER,
JOHN A. EWING,
Attorneys for Defendant in Error.